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No. 83-1780

IN THE

Supreme Court of the United States

October Term, 1983

AARON MARK ZIMMERMAN,
Plaintiff-Petitioner,

v.

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DOLORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS and REID S. MOULE, All Individually And Jointly In Their Capacities As Justices Of The Appellate Division Of The Supreme Court Of The State Of New York, Fourth Judicial Department; THE ONONDAGA COUNTY BAR ASSOCIATION; And THE NEW YORK STATE BAR ASSOCIATION,
Defendants-Respondents.

Brief for Respondent Grievance Committee and Justices in Opposition to Granting a Petition for a Writ of Certiorari

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Dated: May 9, 1984

Question Presented for Review.

Whether the discipline of the petitioner by the Appellate Division of the Supreme Court of the State of New York was properly considered to be a judicial proceeding, the final determination in which is not within the subject matter jurisdiction of a Federal district court and is thus not reviewable by that court.

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Brief for Respondent Grievance Committee and Justices in Opposition to Granting a Petition for a Writ of Certiorari.

Opinion of the Court of Appeals.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 726 F2d 85.

Statement of the Case.

The petitioner was admitted to practice law in the State of New York in 1977. Because he conducts his law practice in Onondaga County, New York, his professional conduct is subject to oversight by the Grievance Committee of the Fifth Judicial District of the State of New York, and to review by the New York Supreme Court, Appellate Division, Fourth Judicial Department.

In the autumn of 1979, petitioner contracted for the listing of his name in the attorneys' section of the "yellow pages" in the Syracuse telephone directory. He purchased a listing of his name in every one of the 25 available law practice categories. He had his name listed by his given name first, rather than by his surname, as is customary.

On or about December 1, 1980, the Grievance Committee, in response to a written inquiry concerning petitioner's advertising from the president of the Onondaga County Bar Association commenced a disciplinary proceeding in the Appellate Division.* The court, based on a finding that such a listing conveys the impression of expertise, whereas petitioner conceded the absence of any experience in most of the areas, found that the listings were in violation of the advertising provision in its code of professional responsibility and imposed a punishment of censure.** Petitioner's appeal to the New York Court of Appeals taken as of right was dismissed "upon the ground that no substantial constitutional question is directly involved".

*Authorized by New York Judiciary Law, § 90.

***In the Matter of Aaron Mark Zimmerman*, 79 AD2d 263, 438 NYS2d 400 (1981). (Copy appended.)

53 NY2d 937, 440 NYS2d 1029 (1981). His motion for leave to appeal was denied as well. 54 NY2d 606 (1981).

The petitioner thereafter commenced this action, purporting to plead claims under 42 USC § 1983, in February, 1982. The amended complaint, in the first, fifth and sixth causes of action, alleges that certain actions of the defendants deprived him of First Amendment rights; in the second cause of action, alleges selective prosecution; in the third cause of action, alleges that he was unreasonably held to a standard of conduct prior to its promulgation; and in the fourth cause of action, alleges that the merits of the complaint against him had been prejudged. For relief, he asked for a declaration "that the actions of the Defendants complained of herein are unconstitutional", together with an injunction preventing further violation of his rights.

In the District Court, Judge McCurn pointed to the above-mentioned aspects of the complaint, held that it "cannot be said that contained within the complaint is a general challenge to 22 NYCRR 1022.16(a)", and concluded:

> "Zimmerman's allegation that the judgment in state court resulted in constitutional derprivations are bound up with his assertions that he was improperly disciplined, and accordingly, this court lacks jurisdiction."

The Court of Appeals agreed with the District Court's determination that the complaint must be dismissed for lack of subject matter jurisdiction. The Court of Appeals noted that disciplinary proceedings before the New York Appellate Division are judicial in nature. The court rejected petitioner's characterization of the Appellate Division action as rule making, holding that "he is complaining about a construction of the rule given in an adjudication of the grievance against him." The decision notes that

the Appellate Division did not ban grouped-by-practice listings, but only found petitioner guilty of a deception because his listing implied experience which he lacked.

Reason for Denying the Writ.

Since the allegations of the amended complaint seek review by the District Court of a judicial decision of the Appellate Division, the courts below properly concluded that they lacked jurisdiction of the subject matter.

The petitioner was censured by the Appellate Division because that court found that by listing his name in each and every one (rather than "most" as he claims)* of the practice categories in the Syracuse telephone directory yellow pages, "the potential for deception was created by the advertisement and respondent's listings were deceptive and misleading." *In re Zimmerman,* 79 AD2d 263, 266, 438 NYS2d 400, 403. The censure was based upon a pre-existing duly promulgated rule of that court which states, in part:

> "A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole."**

*Petitioner's brief, page 4.

**22 NYCRR § 1022.16; see, also, McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, §§ 500 to end. Unlike the decision, which petitioner would have the courts denominate a rule, this duly promulgated rule, as well as others of the court, appears in the official compilation of Codes, Rules and Regulations of the State of New York. The same text may be found in the American Bar Association Code of Professional Responsibility, DRZ-101(a), adopted by the New York State Bar Association and set forth in the appendix to the New York Judiciary Law published as part of McKinney's Consolidated Laws of New York.

Thus, what petitioner is aggrieved by is the court's judicial interpretation and application of the language of the rule in the context of the facts of his case. He does not attack the rule itself.* His challenge, as found by both courts below, was to a judicial holding that where an attorney has his name listed in every one of 25 specialty categories, he has created a situation likely to lead a prospective client into believing that he possesses expertise in all those categories. When, as he admits, he does not possess that expertise, he is guilty of deception.

In recognition of the obvious fact that the court's action was a decision, petitioner sought to appeal to the New York Court of Appeals. As noted above, both his appeal taken as of right, and his motion for leave to appeal, were rejected. This constituted a final state court judgment in a judicial proceeding. See *Turco v. Monroe County Bar Association,* 554 F2d 515, 521 (2d Cir, 1977), cert den 434 US 834 (1977); *Erdmann v. Stevens,* 458 F2d 1205, 1208-9 (2d Cir, 1972), cert den 409 US 889 (1972). Plainly, petitioner's only avenue to this Court was to petition for certiorari in the State court proceeding, but that he did not do. He should not now be heard to call a decision a rule merely because he finds his Federal action barred by the principle enunciated by this Court in *District of Columbia Court of Appeals v. Feldman,* ____ US ____, 103 S Ct 1303 (1983).

Insofar as petitioner argues that the language of the Appellate Division decision creates a rule because it may be applicable to others, obviously the same can be said for any judicial decision which has precedential value. That alone does not diminish or alter its status as a judicial decision. The test enunciated in *District of Columbia Court of Appeals (supra)* and in *Prentis v. Atlantic Coast Line,* 211

*While petitioner attempts to argue the merits of the Appellate Division decision, that is not before this Court. That a state may bar deceitful advertising, as provided in the rule at bar, is beyond cavil. *In re R.M.J.,* 455 US 191 (1982); *Bates v. State Bar of Arizona,* 433 US 350 (1977).

US 210 (1908) is that in a judicial function the court investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is what the Appellate Division did in finding that the listings in question violated the existing regulation. Moreover, what the decision held is common sense, which often makes good law. *Peak v. United States,* 353 US 43, 46 (1957). It did not then purport to promulgate a rule, and it was properly found to be beyond the subject matter jurisdiction of the Federal judiciary.

CONCLUSION.

Petitioner's application for a writ of certiorari should be denied.

Dated: Albany, New York
May 3, 1984

Respectfully submitted,

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APPENDIX.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to practice as an attorney and counselor at law in the State of New York on September 12, 1977. The Grievance Committee for the Fifth Judicial District charged in its petition instituting this disciplinary proceeding that respondent advertised in the Yellow Pages of the New York Bell Telephone Directory for Syracuse, New York for the year 1980-1981 that he practiced in each of the 25 areas of law listed alphabetically in the advertisement which appeared under the caption "Lawyers Grouped by Practice" and that this conduct appears to violate DR 2-101(A) of the Code of Professional Responsibility and subdivision (a) of rule 1022.16 of the Appellate Division, Fourth Department (22 NYCRR 1022.16[a]). According to the petition, respondent admitted that "he has had no experience at all in several of these categories of law".

By this answer respondent admitted the material allegations of the petition, but denied that he either intended to violate or, in fact, violated the Code of Professional Responsibility. Respondent's answer details the methods adopted by the telephone company in obtaining his listing in the "various categories where he was willing to accept clients who came to him with problems", and asserts that he is associated with a well-established law firm to whom he could turn for assistance and that at the time he purchased the advertisement he did not feel that his conduct was improper. He claims that the guidelines and rules set forth in DR 2-101(A) are "vague, ill-defined", and that he had no intention to mislead or deceive. The parties conceded that no order of reference was required.

We find that respondent violated DR 2-101(A) of the Code of Professional Responsibility and the rules of this department (22 NYCRR 1022.16[a]).

DR 2-101(A) of the Code of Professional Responsibility provides: "A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole." Our department rule, effective March 1, 1978 entitled "Advertising by attorneys", is identical to DR 2-101(A).

An examination of the advertisement, a copy of which is attached to the petition and annexed hereto as Appendix A, reveals that its publisher divided the practice of law into 25 separate categories under each of which respondent's name appears first: his name is listed alphabetically by his given name, Aaron, rather than by his surname, Zimmerman. Under the advertisement's caption appears the following legend: "Lawyers listing areas of practice in the Yellow Pages have not necessarily been certified by any state or federal authority as having any more competence in these areas than any other lawyers".

Commercial speech in the form of truthful advertising of legal services, designed to disclose information to permit a consumer to reach an informed decision and to identify the legal services he desires, serves individual and societal interests and while it may be regulated by the State it may not be proscribed (*Bates v State Bar of Arizona*, 433 US 350; see, also, *Matter of Primus*, 436 US 412; *Matter of Koffler*, 51 NY2d 140). Further, a lawyer is permitted publicly to identify one or more areas of law in which he practices, but he may not hold himself out as a specialist in a particular field of law, since no lawyer certification procedure or rules have been established in New York State (Code of Professional Responsibility, DR 2-105).

The advertisement itself makes no overt claim as to the quality of legal services that may be provided. The ambiguous caveat or disclaimer of the advertisement together

with the description of the various categories of law, however, may leave the public with the erroneous impression that some lawyers, including those listed in the advertisement, are certified as specialists or that certification is available. Read as a whole, it cannot be gainsaid that the advertisement is manifestly framed to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed. If the purpose of the advertisement is to permit a consumer to reach an informed and reliable decision and identify the legal provider for the legal services he desires, which is a legitimate aim, this expectation may not be attained by retaining respondent, who candidly admits to his lack of experience in many of the identified areas of law in which his name is listed. Respondent's claim that he is associated with a well-established law firm which can assist him is of no avail because it is his listing, not that of his law firm, which is under review. This claim merely emphasizes the deceptive and misleading nature of the entire advertisement since it is he, not his law firm, who is holding himself out to the public.

The disciplinary rule under review is directly concerned with the prevention of deception: a legitimate State interest which the regulation seeks to protect. The thrust of the regulation is honest public communication so that "the stream of commercial information [may] flow cleanly as well as freely" *(Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748, 772). No detailed guideline or signpost other than an innate sense of right or wrong should be necessary to achieve this goal. A lawyer, particularly, should have an awareness of the moral quality of his own conduct and the ability to make the obvious judgment that the design of such an advertisement is to gain clients by guile and delusion. Measuring the conduct of the respondent against the plain and obvious meaning and intent of the regulation, we conclude that the potential for deception was created by the advertisment and respondent's listings were deceptive and misleading. The holding by the Court

of Appeals in *Matter of Koffler* (51 NY2d 140, *supra)* does not require a contrary conclusion. There it was held that direct-mail solicitation of potential clients is constitutionally protected commercial speech. We hold here that commercial speech must be honest and truthful, and prospective clients should not be beguiled or deceived by the content or the subject matter of the public utterance. Respondent's conduct subverted the true purpose of permitted advertising by lawyers and no prior sanction should be required to insure complete honesty and truthfulness by lawyers in all of their utterances, public or otherwise, to prospective clients. Because of respondent's youth, his disclaimer of any intent to mislead or deceive, and his naiveté in relying on the assurances of the printers of the advertisement as to the propriety of the listings, he should not be disbarred or suspended but should be censured.

DILLON, P. J., CALLAHAN, DOERR, DENMAN and SCHNEPP, JJ., concur.

Motion to strike paragraph ninth of the petition granted. Order of censure entered.

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